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NO. 90-68

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1990

EDDIE S. YLST
Petitioner

v.

OWN DUANE NUNNEMAKER
Respondent

On Writ Of Certiorari
To the Ninth Circuit Court of Appeals

BRIEF OF THE OFFICE OF WAYNE COUNTY PROSECUTING ATTORNEY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF THE QUESTION

UNDER HARRIS V REED MUST THE FEDERAL COURTS ON HABEAS CORPUS REVIEW, IN LOOKING FOR THE "PLAIN STATEMENT" OF PROCEDURAL DEFAULT BY THE STATE COURT SYSTEM, LOOK TO THE STATE COURT JUDGMENT WHICH ADDRESSED THE CLAIMS OF THE DEFENDANT AND HELD THAT THERE WAS A PROCEDURAL DEFAULT, RATHER THAN SIMPLY TO ORDERS OF HIGHER STATE COURTS DENYING REVIEW OR RELIEF?

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STATEMENT OF THE CASE

Amicus adopts the statement of the case of the Petitioner.

INTEREST OF THE AMICUS

Amicus is the Office of the Wayne County Prosecuting Attorney. That office prosecutes all criminal cases in the County of Wayne in Michigan, the largest county in the State, and one of the largest in the country. The office also litigates federal habeas corpus matters in the federal courts, as well as Motions for Relief from Judgment in the state courts, where questions with regard to procedural bar are necessary to the question of relief; further litigation in the appellate courts results in "form" orders of denial if leave to appeal is denied. Amicus was recently "scolded" by a panel of the Sixth

Circuit for taking a position similar to that now taken by the Petitioner (though relief was denied the petitioner). Amicus thus has a great interest in the outcome of this litigation, with respect of the course of future litigation in the state and federal courts on procedural bars.

ARGUMENT

UNDER HARRIS V REED THE FEDERAL COURTS ON HABEAS CORPUS REVIEW MUST, IN LOOKING FOR THE "PLAIN STATEMENT" OF PROCEDURAL DEFAULT BY THE STATE COURT SYSTEM, LOOK TO THE STATE COURT JUDGMENT WHICH ADDRESSED THE CLAIMS OF THE DEFENDANT AND HELD THAT THERE WAS A PROCEDURAL DEFAULT, RATHER THAN SIMPLY TO ORDERS OF HIGHER STATE COURTS DENYING REVIEW OR RELIEF.

Respondent in this case first raised federal constitutional challenges to certain testimony on his direct appeal to the California Court of Appeal. That court declined to address the merits of the claims, holding that the failure to interpose a contemporaneous objection at trial was a procedural bar to review. Respondent sought discretionary review in the California Supreme Court, which, without comment or case citation, declined to hear the case. Further review was sought by way of state petitions for habeas

corpus, which were denied. Ultimately a petition for habeas corpus was filed in the federal district court raising the issue regarding which the California Court of Appeal had found a procedural default, and the district court declined to consider the issue because of the state procedural default.

The Ninth Circuit disagreed with the district court with regard to the procedural default. Relying on Harris v Reed, 103 L Ed 2d 308 (1989) the court held that given the statement in Harris that "a federal claimant's (state) procedural default precludes federal habeas review...only if the last state court rendering a judgment in the case rests its judgment on the procedural default" (emphasis added by the court, 896 F 2d at 1203), and given that the California Supreme Court had not rested its decision

not to review the case on Respondent's state habeas petition explicitly on a procedural default, the procedural bar was inapplicable on habeas review. The court appeared to rely heavily on the fact that after his request for review on direct appeal was denied, Respondent had raised the same issue in the California courts on a petition for writ of habeas corpus, those petitions being denied without comment by the California Supreme Court. The court considered the denial of relief on collateral attack (habeas review) in the state court to be a "judgment," though admitting that the initial denial of review by the California Supreme Court on direct appeal might not have been a judgment, drawing a distinction because California law allows the filing of a habeas petition in the California Supreme Court as an original matter, not as a matter of review of the denial of such a petition by the

California Court of Appeal (at least this was the view of California law of the court). Amicus submits that the Ninth Circuit view of Harris should be rejected.

In many jurisdictions, review after the direct appeal is over begins in the trial court, with limited grounds for relief available. For example, in Michigan after the direct appeal is over the defendant may only seek relief by filing a "Motion for Relief From Judgment" in the trial court. To obtain relief on grounds which could have been raised previously, the defendant must show cause and prejudice for his procedural default. A failure to do so results in denial of the motion. Appellate review is by leave, and denial of review would be by form order ("for lack of merit in the grounds presented"). See MCR 6.502; 6.508(D); 6.509. Thus, the apparent California procedure allowing a petition

for collateral review in the appellate court would not occur, and the holding of the Ninth Circuit that the denial of the petition for habeas corpus by the California Supreme Court was a "judgment" would be inapplicable to denials of requests for review of lower court rulings. Nonetheless, amicus submits that the Ninth Circuit too narrowly viewed this Court's holding in Harris; alternatively, if not, this Court should make clear that the federal courts on habeas should look to the last state court discussing the Petitioner's claims in substance, and finding procedural default, in determining the procedural default/plain statement question under Harris.

That the view of Harris taken by the Ninth Circuit has not been limited to situations where state law allows collateral attacks in the appellate courts,

rather than only petitions for review of denial of collateral attacks in the trial court, is demonstrated by Johnson v Burke, 903 F 2d 1056 (CA 6, 1990). After his direct appeal had been taken and lost, the petitioner made four unsuccessful attempts at postconviction relief in the state courts. On his final attempt his "application for leave to file a delayed motion for a new trial" (prior to the creation of the Motion for Relief From Judgment rule) was denied. The trial court relied on principles of finality to decline to reach the merits of the motion, instead denying the defendant's request for leave to file the delayed motion for new trial. Discretionary leave was sought from the Michigan Court of Appeals, which denied it in a form order ("for lack of merit in the grounds presented"), and the Michigan Supreme Court, which also denied in a form

order (for failure to persuade that the questions require review).

In the Sixth Circuit (which affirmed the denial of relief to the petitioner) the argument was made by the State that under Harris the "last state court rendering a judgment" was the trial court, the appellate courts simply denying review on discretionary applications. It was also pointed out that the language in the form order "denied for lack of merit" as a matter of logic referred to the underlying decision being appealed; that is, the order was a finding that there was no merit in the claim that there was error in the trial court's refusal to hear the merits of the claim. The court was not itself addressing those underlying merits in denying discretionary review from a decision refusing to hear the merits.

The Sixth Circuit found these arguments that the Michigan Court of Appeals' and Michigan Supreme Court's orders were orders "denying review" of a procedural decision to be "wholly without merit," and in effect held that the plain statement had to come from the appellate courts when denying discretionary review of a lower court procedural holding.

On the other hand, the eleventh circuit has taken a more realistic approach. In Harmon v Barton, 894 F.2d 1268 (CA 11, 1990), the petitioner raised an issue which had not been raised in his direct appeal or in his first postconviction motion. Rather, the issue, which was ultimately presented by way of a federal habeas corpus petition, was first raised in a second postconviction motion in the trial court. As to this latter motion,

the trial court concluded, consistent with state law, that the petitioner was procedurally barred from pursuing his claim because he neither raised the issue on his direct appeal nor in his first postconviction motion. The state appellate court then issued a per curiam affirmance of the trial court's ruling. When the matter found its way to the federal courts, the question was whether, in light of this Court's decision in Harris, the per curiam affirmance of the trial court's ruling was a clear and express statement of reliance on a state procedural bar. The petitioner argued that a state per curiam affirmance without a written opinion should be construed as a decision on the merits because the appellate court, as the last state court rendering a judgment, did not clearly and expressly state that its judgment rested on a state procedural bar.

The state countered that affirmance without comment of a decision explicitly based on a procedural bar was unambiguous and was factually distinguishable from Harris.

The eleventh circuit prefaced its analysis as follows:

> It is, of course, incumbent upon this court to ascertain for itself whether the state court clearly and expressly rejected petitioner's claim on the basis of an independent and adequate state procedural ground. Such a determination necessarily involves an analysis of state law concerning the effect of a per curiam affirmance of a trial court decision to summarily deny post-conviction relief which expressly relies on the ground of procedural default for its result. 894 F.2d at 1272, citations omitted.

The Court then noted that under Florida law, a decision by an unwritten per curiam affirmance was not a precedent for a principle of law and should not be relied

upon for anything other than res judicata. The Court then stated and held as follows:

> The "plain statement" rule, it should be emphasized, applies only when an ambiguity exists in the state court disposition. A per curiam affirmance decision does not create an ambiguity to an otherwise unambiguous situation, just as it does not clarify ambiguity that exists based on the decision below." Rease v. State, No. 88-3754 (M.D. Fla. Aug. 25, 1989). Stated differently, the plain statement rule should not be applied to create an ambiguity where one did not exist simply because the appellate court, by its per curiam affirmance, elected not to restate an unambiguous lower court ruling. We conclude that the court's per curiam ruling explicitly based on procedural default is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts." 894 F.2d at 1273 (emphasis added).

This common-sense holding is inconsistent with the view taken by the Sixth Circuit in Johnson v Burke, and with the Ninth Circuit

in this case. The denial of discretionary review is not precedent, and has no value other than for res judicata; the denial of the habeas petition by the California Supreme Court in this case is of similar effect. The state court to consider the case and render a determinative decision found a procedural bar, and found it unambiguously. This ruling should be followed. State courts should not be required to revamp their systems for denial of review so as to insure that it is clear that denials of review or relief without comment are not decisions on the merits, and do not sub silencio overturn clear decisions by lower courts which have found a procedural bar to relief. As well-put by the eleventh circuit, "the plain statement rule should not be applied to create an ambiguity where one did not exist" simply because in further denials of relief the

busy state courts elect not to restate an unambiguous lower court ruling.

CONCLUSION

Wherefore, amicus respectfully requests that the judgment of the Ninth Circuit be reversed.

Respectfully submitted,

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